

Janice Robinson began working as a custodian for the respondent on June 9, 2005. Claimant works from 4 p.m. to 1 a.m. and takes her lunch between 7:30 and 8:30 p.m. on

the employer's premises. The respondent provides a designated area (garage) for employees to eat and smoke. Claimant described the accident as follows:

I happened to be on my lunch prior to the accident. I had stepped out into the parking lot to put a cigarette out. I came back in, realized that there was a chair sitting actually in the doorway of the bay door and it had to be moved so I could secure the building from the outside. I went to remove the chair, went to grab for it and my feet went out from underneath me and I -- next thing I knew I was on the ground.¹

The claimant further noted that the doorway was supposed to be closed and locked when the break or lunch is over.

After viewing the security video which captured the incident, the ALJ determined claimant was engaged in horseplay and denied claimant compensation. The ALJ described what the video depicted in pertinent part:

The video evidence shows the claimant coming up to the chair, planting her left foot, and then delivering a kick to the chair. In doing so, she slightly twists her upper body to the left so that the kick resembles a martial arts move. Unfortunately for the claimant, she then gets her foot trapped between the arm and the seat of the chair, and, moving forward, becomes entangled in the chair and falls.

Also unfortunate for the claimant is that she lied about this incident. The chair in question is a lightweight plastic chair. The claimant testified that she was approaching the chair in order to move it so she could close the garage door. If this were true, then conceivably it would not be inappropriate to give such a durable item a slight kick to shove it out of the way, as this would cause no harm to the property. However, as the claimant has lied once, her credibility about her motive in approaching the chair is suspect. In addition, the kick the claimant delivered, had it landed properly, certainly would have sent the chair flying several feet. While it is debatable whether this would have harmed such a plastic chair, it cannot be argued that this is a permissible way to treat the property of the respondent.²

This factfinder agrees, after viewing the hazy security video, that it does not appear that claimant slipped and then kicked the chair as she fell. It appears that claimant was giving the chair a kick to shove it back, became entangled in the chair and then slipped and fell forward. But the video does support claimant's version that she had been outside where it was wet, returned to the break area and then was in the act of moving the chair when she fell. Moreover, the video does show the chair visible in the open doorway and

¹ P.H. Trans. at 6-7.

² ALJ Order (Aug. 23, 2007) at 1.

close enough to the open doorway to appear to require that it be moved in order to close the door.

In workers compensation litigation, it is the claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.³ The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.⁴

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.⁵

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

. . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."⁶

Respondent contends that claimant was engaged in horseplay when she kicked the chair and should be denied benefits accordingly. It has long been the law in Kansas that participants in horseplay, who suffered injuries as a result, were precluded from collecting workers compensation benefits.⁷ But the sportive act or horseplay by definition is an act the employee was voluntarily participating in and unrelated to the work he was employed to perform.⁸

³ K.S.A. 44-501 and K.S.A. 44-508(g).

⁴ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

⁵ K.S.A. 44-501(a).

⁶ *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

⁷ *Neal v. Boeing Airplane Co.*, 161 Kan. 322, 167 P.2d 643 (1946).

⁸ *Id.*, Syl. 4.

Here, it is undisputed that claimant was required to close the open door after her break was over. And integral to performing that task she testified that she needed to move the chair out of the doorway. As noted by the ALJ, the manner she chose to perform that task by using her foot was improvident, nonetheless, she was performing a required task incidental to her work when the accident occurred. Although claimant certainly was less than candid, the actual incident depicted by the video does support her contention that the chair needed to be moved to close the door. Claimant denies she was kicking the chair out of the way but the video tells a different story. But rather than horseplay, this incident appears to be just an unfortunate incident at work resulting in an injury to claimant. Accordingly, this Board Member finds claimant has met her burden of proof to establish that she suffered accidental injury arising out of and in the course of her employment.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁹ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.¹⁰

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Bryce D. Benedict dated August 23, 2007, is reversed and the case is remanded to the Judge for further orders consistent with the findings and conclusions set forth above.

IT IS SO ORDERED.

Dated this _____ day of October 2007.

BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant
Ronald J. Laskowski, Attorney for Respondent and its Insurance Carrier
Bryce D. Benedict, Administrative Law Judge

⁹ K.S.A. 44-534a.

¹⁰ K.S.A. 2006 Supp. 44-555c(k).